PP

v.

GURDIAL SINGH PRETUM SINGH & ORS

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CRIMINAL TRIAL NO: 45-4-00]
22 MAY 2002

EVIDENCE: *Witness - Child witness - Evidence, when admissible - Sworn and unsworn evidence - In what circumstances can a conviction stand - Review of authorities*

CRIMINAL PROCEDURE: *Trial - Trial within a trial - Caution statements of accused - Whether voluntary - Whether prosecution could be called to rebut accused's case - Whether provisions of s. 16(2) Kidnapping Act 1961 were read to accused - Whether failure to do so rendered statements inadmissible - Whether accused could submit a no case to answer at end of prosecution case - Review of authorities - Evidence Act 1950, ss. 24, 27 - Criminal Procedure Code, s. 425*

The eight accused were charged for an offence under s. 3 of the Kidnapping Act 1961 ('the Act') read together with s. 34 of the Penal Code. However, the prosecution soon tabled an alternative charge against all the accused for an offence punishable under s. 5(1) of the same Act after it was ruled that the caution statements given by four of them could not be admitted in evidence. All of them pleaded guilty to the alternative charge.

Held:

[1] A conviction cannot stand on the uncorroborated evidence of an unsworn child witness (s. 133A proviso). It followed therefore that where the sworn evidence of a child witness is given on behalf of the prosecution, an accused can be convicted of the offence, even if the sworn evidence is not corroborated. In the present case, the child witness showed that he was able to understand questions put to him and could give rational answers, that he was possessed of sufficient intelligence to justify the reception of his evidence, and that he was able to understand the duty of telling the truth. Nonetheless, the child witness ought not to give his evidence on oath, by reason of his tender age. (pp 43 h, 44a & 46h)

[2] The case of *Mohd Desa bin Hashim v. PP* is binding authority that the voluntariness of the s. 27 information in the present case must be determined by a *voir dire*. And on the crucial issue of voluntariness, the evidence of the police officer concerned was absolutely essential for the court to come to a proper conclusion. Without the evidence of the police officer concerned, there was the apprehension of justice failing because of an erroneous ruling. (pp 48 b-c & 54 c)

[3] Based on the authorities, where the challenge to the confession evidence is to be based upon a scrutiny of the prosecution case and not of the defence evidence, an accused may raise a submission in the *voir dire* of no case to answer at the close of the prosecution case. In the present case, the challenge to the admissibility of the caution statements was based upon a scrutiny of the prosecution case for it was contended that the prosecution had not complied with the provisions of s. 16(2) of the Act. (p 58 b-c)

[4] None of the recording officers testified that they had explained to the accused that they were not bound to answer any question, or that they had read to the accused the provisions of s. 16(2) of the Act. The legal question is voluntariness, but a failure to read the provisions of s. 16(2) will leave a doubt as to whether an accused fully understands that he is not obliged to answer any question. Therefore, under the Act, it is imperative to read the provisions of s. 16(2) to the accused, to remove that doubt, and to comply with the requirements of the law as well. (pp 58 c & 59 g)

[5] Pursuant to s. 16(3) of the Act, a police officer may question a person whom he has not cautioned, if he has not made up his mind to charge that person. But if that person is later charged for an offence under the Act, then he is entitled to the protection afforded by sub-ss. (1) and (2). His statement to questions permitted under s. 16(3) could be admitted, if he has not been first cautioned in the manner prescribed in sub-ss. (1) and (2). Otherwise his statement made without being forewarned of the consequences may be admitted, and that could not have been the intention of the legislature. (pp 59 i & 60 a-b)

[Accused pleaded guilty to alternative charge under s. 5(1) of the Act.]

Case(s) referred to:

Ajodha v. The State [1981] 2 All ER 193 ***(refd)***
Crosdale v. The Queen [1995] 2 All ER 500 ***(refd)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 ***(refd)***
HKSAR v. Hui Chi Wai & Ors [2001] 3 HKC 531 ***(refd)***
Illian & Anor v. PP [1988] 1 MLJ 421 ***(refd)***
Kee Seng Nee v. Rex [1949] 15 MLJ 210 ***(refd)***
Loke Poh Siang v. PP [1957] 23 MLJ 107 ***(refd)***
Loo Chuan Huat v. PP [1971] 2 MLJ 167 ***(refd)***
Md Desa Hashim v. PP [1995] 4 CLJ 677 ***(refd)***
Phon Nam v. PP [1991] 2 CLJ 1467; [1991] 1 (Rep) 381 ***(refd)***
PP v. Aidil Ma'rof [1992] 2 CLJ 1239; [1992] 3 CLJ 317 ***(refd)***
PP v. Abdul Hamid [1969] 1 MLJ 53 ***(refd)***
PP v. Abdul Rahim Abdul Satar [1990] 1 CLJ 840; [1990] 3 CLJ (Rep) 1 ***(refd)***
PP v. Boo Chew Ha [1963] 29 MLJ 33 ***(refd)***
PP v. Harilal Sachi Narayan [1995] 4 CLJ 745 ***(refd)***
PP v. Kalaiselvan [2001] 4 AMR 3973 ***(refd)***
PP v. Mohd Noor Abdullah [1992] 1 CLJ 702; [1992] 3 CLJ (Rep) 404 ***(refd)***
PP v. Muniandy & Ors (Selangor Criminal Trial No: 58-10-1986) (unreported) ***(refd)***
PP v. Phon Nam [1987] 1 CLJ 299; [1987] CLJ (Rep) 924 ***(refd)***
PP v. Phon Nam [1989] 1 CLJ 7; [1989] 1 CLJ (Rep) 142 ***(refd)***
PP v. Samsul Kamar Mohd Zain [1988] 1 CLJ 542; [1988] 2 CLJ (Rep) 310 ***(refd)***
R v. Brophy [1982] AC 476 ***(refd)***
R v. Browne 29 Cr App R 106 ***(refd)***
R v. Day [1940] 1 All ER 402 ***(refd)***
R v. Jackson (Criminal Division 21 December 1984) (unreported) ***(refd)***
R v. Joseph Wilson 41 Cr App R 226 ***(refd)***
R v. Owen [1952] 1 All ER 1040 ***(refd)***
R v. Naylor (Criminal Division 2 February 1995) (unreported) ***(refd)***
R v. Sanderson [1953] 1 All ER 485 ***(refd)***
R v. Tang Yuk Yan [1991] 2 HKC 214 ***(refd)***
Ramasamy v. R [1955] MLJ 95 ***(refd)***
Rameshwar Dayal v. State of UP AIR [1978] SC 1558 ***(refd)***
Ramli Kechik v. PP [1986] 1 CLJ 309; [1986] CLJ (Rep) 243 ***(refd)***
Re Adam; Hoesin Ghani v. PP [1958] 24 MLJ 229 ***(refd)***
Sidek Ludan v. PP [1995] 3 MLJ 178 ***(refd)***
State of Gurajat v. Butasing Indrasing [1990] 3 Crimes 619 ***(refd)***
Swaby v. The Queen Privy Council (22 December 1997) (unreported) ***(refd)***
Tham Kai Yau & Ors v. PP [1977] 1 MLJ 174 ***(refd)***
Yusaini Mat Adam v. PP [2000] 1 CLJ 206 ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 113(1)(a)(ii), (2), 425
Dangerous Drugs Act 1952, ss. 37A(1)(b), 37A(2)
Evidence Act 1950, ss. 24, 27, 133A, 134

Kidnapping Act 1961, ss. 3, 5(1), 16(1)(b), (2), (3)
Oaths and Affirmations Act 1949, ss. 6, 8
Penal Code, s. 34

Other source(s) referred to:
Archbold, *Criminal Pleading, Evidence and Practice,* 2002, para 15-288
Hamid, *Criminal Procedure,* 2nd edn, pp 1052-1053, 1056
Mallal, *Criminal Procedure,* 5th edn, para 15527
Rafiah Salim, *Evidence in Malaysia and Singapore,* 2nd edn, p 146
Sarkar on Evidence, 15th edn, vol 2, pp 1955, 1956, 1961

For the prosecution - Mohd Azari Harun; M/s AG's Chambers
For the 1st accused - Gurbachan Singh Pannu; M/s Bachan & Kartar
For the 2nd accused - R Ledchumiah; M/s Ramamoorthy Ledchumiah & Co
For the 3rd, 4th, 6th & 8th accused - Harjit Singh Nijar (Manjit Kaur Nijar); M/s Nijar & Nijar
For the 5th accused - Wendy Ooi Su Ghee; M/s Ooi Sam Heng & Assoc
For the 7th accused - Sukhdev Singh (Amrit Pal Singh); M/s Sukhdev & Amrit

Reported by Usha Thiagarajah

JUDGMENT

Jeffrey Tan J:

Trial commenced against the accused, on the following charge:

> Bahawa kamu bersama-sama pada 29-09-99 jam 1.15. petang di persimpanan Jalan Jelawat 5, Taman Sg. Abong, dalam Daerah Muar, di dalam Negeri Johor, telah menahan dengan salah seorang budak laki-laki bernama Lim Jian Wei no. surat beranak: A14 056137 dengan niat untuk menuntut wang tebusan sebanyak RM400,000.00 dari bapa beliau (Penjaga Yang Sah) yang bernama Lim Swee Chong No Kad Pengenalan: 570305-01-7153 dan dengan ini kamu telah melakukan satu kesalahan di bawah Seksyen 3 Akta Colek 1961 (Pindaan 1997) yang dibaca bersama-sama Seksyen 34 Kanun Keseksaan dan boleh dihukum di bawah Seksyen dan Akta yang sama.

But the prosecution soon tabled an alternative charge against the accused, for an offence punishable under s. 5(1) of the same said Act, after it was ruled that the caution statements given by OKT2, OKT5, OKT7 and OKT8 could not be admitted in evidence. Hitherto, the court had made several other rulings in the course of a long trial that only ended this day with the plea of guilt by all accused to the alternative charge. It is history now, but the reasons for the rulings of the court were the following.

First, it is necessary to briefly relate the story of the kidnap victim and his parents. At about 1.15pm on 29 September 1999, three or four masked men forcibly abducted Shaun Lim Jian Wei, a boy of seven, who was on his way home from school in a chauffeur-driven car with his mother (SP15 – Christina Thio Swee Geok) and sister. Later, someone telephoned Shaun's father's office. SP15 pleaded with the caller not to harm Shaun. The caller refused to speak to SP15. The caller wanted to speak to Shaun's father (SP16 – Lim Swee Chong) who was then not in Muar. The caller said he would telephone again. The caller telephoned again at 4.30pm. SP15 again pleaded with the caller not to harm Shaun. The caller wanted to speak to SP16. SP15 informed the caller that SP16 would be back soon. The caller telephoned again at 5pm. SP15 again pleaded with the caller not to harm Shaun. The caller asked for SP15's house telephone number. The caller spoke to SP16, who by then had returned from Kuala Lumpur. The caller instructed SP16 to secure RM1,000,000, a red bag, and a red T-shirt. The caller said that he would call again on 30 September 1999.

On 30 September 1999, the caller telephoned several times to SP15's house. On each occasion, SP15 pleaded with the caller not to harm Shaun. The caller wanted to speak to SP16. The caller asked for a ransom of RM1,000,000. SP16 attempted to negotiate, but the caller hung up the telephone. After 10am, the caller telephoned almost on an hourly basis. SP16 informed the caller that he could only raise RM300,000. After several rounds of negotiations, the caller agreed to accept RM500,000 cash and RM100,000 worth of jewellery. At 3pm the caller telephoned and instructed SP16 to put the ransom in a red bag, to wear a red T-shirt, to carry a 012 mobile phone, and to proceed to the Seremban Railway Station and board the 4pm train bound for Johore Baru. SP16 failed to catch that train. The caller telephoned. The caller instructed SP16 to proceed to Tampin or Segamat, and catch that 4pm. Seremban train bound for Johore Baru. At the Segamat Railway Station, SP16 received another telephone call on his mobile phone. The caller instructed SP16 to return to Muar. At the Tangkak Toll Station, SP16 received another telephone call. The caller instructed SP16 to proceed to the Pagoh Rest Area of the North-South Highway. SP16 reached the Pagoh Rest Area at about 8.30pm. At about 9.30pm the caller telephoned. The caller instructed SP16 to deposit the red beg, next to the rubbish bins in the rubbish area. SP16 did as he was instructed. About 15 minutes later, the caller telephoned and instructed SP16 to proceed to Ayer Itam. SP16 reached Ayer Itam at about 10pm. At about 11.30pm, SP15 telephoned. SP15 instructed SP16 to return home. SP15 informed SP16 that the kidnappers had informed her that Shaun would not be released that night and that the police had taken possession of the red bag.

On 1 October 1999, at about 7.30am, the caller telephoned and said that the police had taken possession of the red bag. At 9.30am, the caller telephoned and said that the red bag was in the Pagoh Police Station. The caller said he wanted to settle the matter quickly. The caller asked SP16 to get hold of RM400,000, and said that he would release Shaun.

Meantime, the police had returned the red bag to SP16. At 2pm, the caller telephoned and instructed SP16 to put the ransom in a rubbish bag. The caller instructed SP16 to proceed to Taman Mas Merah, Muar. About 15 minutes later, at Taman Mas Merah, SP16 received another telephone call. The caller instructed SP16 to proceed to the end of Taman Mas Merah and deposit the red bag near a bushy, area by the side of the road. SP16 did as he was instructed, and departed. But before SP16 could reach his house, the caller telephoned. The caller instructed SP16 to retrieve the red bag. The caller informed SP16 that the police were trailing him (SP16). SP16 retrieved the red bag.

At 5pm, the caller telephoned and instructed SP16 to drive to Malacca with the ranson, and wait by the side of the Renaissance Hotel. SP16 reached Malacca at about 6pm. At 7pm, the caller telephoned and said that the police were trailing him (SP16). The caller instructed SP16 to proceed to Muar. When SP16 reached Muar at about 8pm, the caller telephoned and instructed SP16 to proceed to Taman Bahagia, Muar, and deposit the bag with the ransom "below the road sign Lorong Jati 2 at Taman Bahagia". SP16 did as he was instructed, and departed. When SP16 reached his house, the caller telephoned and informed SP16 that the police were trailing him (SP16). The caller instructed SP16 to retrieve the bag. SP16 returned to the place where he had deposited the bag. But the bag was not there anymore. SP16 waited by the roadside for further instructions.

At about 9.30pm, SP15 telephoned and informed SP16 that the kidnappers had telephoned and had informed her (SP15) that Shaun would be released in the vicinity of the Batu Pahat Hospital. SP15 and SP16 proceeded immediately to Batu Pahat. But Shaun was not to be found at the Batu Pahat Hospital. A hospital attendant informed SP15 that a policeman had taken Shaun to the police station. At the Batu Pahat Police Station, SP15 and SP16 found Shaun in the safe hands of the police.

Shaun gave a deposition of all that had happened to him whilst in captivity. Shaun related that "sticky tape" was placed over his mouth whilst he was in the kidnappers' car, that his legs were tied when he was in the kidnappers'

house, that he was always given sleeping pills and put to bed, that his eyes were always "blocked", that he could hear a woman's voice, and that on the 3rd day he was released somewhere near a hospital.

But before Shaun gave his deposition, the court conducted an enquiry to test the ability of Shaun to understand the nature of an oath, and to ascertain if Shaun is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of telling the truth, for Shaun was not even nine years old when he was called to testify for the prosecution (on the necessity of such an inquiry, see *Yusaini bin Mat Adam v. PP* [2000] 1 CLJ 206, and, *Sidek bin Ludan v. PP* [1995] 3 MLJ 178). Shaun showed remarkable intellect, precocity and the ability to comprehend all questions put to test him during the inquiry conducted under s. 133A of the Evidence Act. But Shaun's evidence was received not on oath, as the court although convinced that Shaun had more than sufficient intelligence to justify the reception of his evidence and understood the duty of speaking the truth was yet not convinced that Shaun truly understood the nature of an oath.

Section 133A of the Evidence Act 1950 (which came into force on 1 November 1971) reads as follows:

> Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given on oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of telling the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code of the Federated Malay States shall be deemed to be a deposition within the meaning of that section:
>
> > Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some material evidence in support thereof implicating him.

In other words, the evidence of a child witness who does not understand the nature of an oath may be received, though not on oath, if that child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of telling the truth. However, there is a proviso pertinent to criminal trials – where evidence admitted under s. 133A is given on behalf of the prosecution, the accused cannot be convicted of the offence, unless that evidence admitted under s. 133A is corroborated by some material evidence

in support thereof implicating him. "The effect of this amendment (s. 133A), particularly the proviso therein, is that a conviction cannot stand on the uncorroborated evidence of an unsworn child witness. It is now insufficient to merely give a warning on the dangers of so convicting, as the new provision now makes it a rule of law that the evidence of an unsworn child witness shall be corroborated" (*Evidence in Malaysia and Singapore* by Rafiah Salim, 2nd edn, p. 146). It follows therefore, that where the sworn evidence of a child witness is given on behalf of the prosecution, an accused can be convicted of the offence, even if that sworn evidence is not corroborated by some material evidence in support thereof implicating him.

Evidence in Malaysia and Singapore (ibid) at 146-147, understands s. 133A as such:

> A further consequence of this is that the Malaysia law now distinguishes between the testimony of a sworn and an unsworn child witness. In the case of an unsworn child witness, the said rule of law applies; and in the case of a sworn child witness the old rule of prudence, ie the need to give an exhaustive warning on the dangers of convicting on such uncorroborated evidence, applies.

According to *Evidence in Malaysia and Singapore (ibid)* at 149, the case of *Loo Chuan Huat v. PP* [1971] 2 MLJ 167 (where it was held by the Federal Court that the evidence of a child whether sworn or unsworn must be corroborated) "is no longer applicable in Malaysia with regard to the testimony of an unsworn child witness. The Malaysian position is now similar to the English position in which the court shall not convict on the uncorroborated evidence of an unsworn child witness". It may just be so.

In *Tham Kai Yau & Ors v. PP* [1977] 1 MLJ 174, the facts were as follows. The appellants were convicted of murder. The only witness who spoke on the incident was the son of the deceased, who was 13 at the time of the incident but 14 by the time he gave his evidence on oath. One of the grounds of appeal was that the jury was not given due warning against accepting the evidence of the son of the deceased, without corroboration. But the Federal Court in *Tham Kai Yau & Ors v. PP* did not follow *Loo Chuan Huat v. PP*:

> In cases involving child evidence of tender years, we are of the opinion that it would not be necessary to give a formal warning that is dangerous to convict on the uncorroborated evidence of a child of tender years. It is sufficient if the Judge adopts the prudent course of advising the jury to pay particular attention to or to scrutinise with special care the evidence of young children and explains the tendencies of children to invent and distort ... .

> In the present case, however, the learned Judge did not consider PW8 a child of tender years, and he was satisfied that he possessed sufficient intelligence to understand the meaning and significance of an oath. The absence of such warning was not fatal as there was in fact substantial corroboration of the boy's evidence. The appeal on this ground, we thought, must therefore fail.

In the latter case involving the evidence of a sworn child witness, the Federal Court in *Tham Kai Yau & Ors v. PP* merely held that the critical essential is to be extremely careful – "we are of the opinion that it would not be necessary to give a formal warning that is dangerous to convict on the uncorroborated evidence of a child of tender years ...". The Federal Court in *Tham Kai Yau & Ors v. PP* did not say that the court cannot act on the uncorroborated sworn evidence of a child witness.

In *PP v. Mohd Noor bin Abdullah* [1992] 1 CLJ 702; [1992] 3 CLJ (Rep) 404, KC Vohrah J (as he then was) observed:

> in so far as this case *(Loo Chuan Huat v. PP)* deals with the unsworn evidence of a child, the matter is overtaken by section 133A of the Evidence Act 1950 where there is now a requirement in law that the unsworn evidence of any child of tender years has to be corroborated by some other material particular in support implicating an accused before he can be convicted ... .

In *Sidek bin Ludan v. PP (supra)*, at 183, Malik Ishak J expressed his learned opinion in unmistakable terms:

> This amendment (s. 133A) distinguishes between the testimony of a sworn and an unsworn child witness. In the case of a sworn child witness the old rule of prudence applies, *viz*, the need to give an exhaustive warning on the dangers of convicting on such uncorroborated evidence. Where in the case of an unsworn child witness, s. 133A of the Act applies.

The general rule is that an accused can be convicted on just one piece of direct evidence (Evidence Act 1950 s. 134). But in the light of s. 133A and other authorities, the exceptions to the general rule will be the cases involving the evidence of interested or suspect witnesses, of a complainant in sexual cases, of a co-accused, of an unsworn child witness, and of an accomplice. But the evidence of a sworn child witness need not be corroborated. That meant in the present case, that the ultimate penalty could be exacted from the accused, or any of them, on the uncorroborated evidence of a child, *albeit* sworn. When Shaun was summoned to testify, the evidence pertaining to the actual abduction was yet to be adduced by the prosecution, and there was no way of knowing at that stage if it would all come down to the sworn evidence of a child – a child who had yet not reached puberty, nor given his tender years would have attained a reasonable level of maturity. Given that whether

the rule of law (s. 133A) or rule of prudence would apply, would depend on whether the testimony of the child witness is sworn or unsworn, it was imperative that the court be convinced altogether that Shaun truly understands the nature of an oath.

Shaun was a bag of nerves when he entered the court room. But he soon composed himself and then showed, in an engaging conversation with the bench – on the subject of his 'gameboy', his flight from Australia to Malaysia, his life and school in Australia, and then on the subject of truth and falsehood – that he was a bright and lively boy. Shaun understood all questions put to him, and expressed himself very well. He answered rationally and intelligently. All who heard him would not have not been impressed by his intelligence and precocity. The only question was whether he understood the nature and obligation of an oath.

In a judicial proceeding, the oath is the solemn declaration or undertaking by a witness that the evidence which he shall give "shall be the truth, the whole truth and nothing but the truth". It is the assertory oath that all witnesses (an accused may elect to give an unsworn statement from the dock) must take (see Oaths and Affirmations Act 1949 s. 6), unless the court is of the opinion that the person who by reason of immature age ought not to be admitted to give evidence on oath (see Oaths and Affirmations Act 1949 s. 8). In India, a child witness under 12 years of age need not be sworn. "In England, a child, to be a competent witness, must believe in punishment in a future state for lying ... The court will ascertain by examination whether the infant understands the nature of an oath or the consequences of falsehood" (*Sarkar on Evidence* 15th edn vol 2 p. 1955). "... the question in each case is whether having regard to the nature and circumstances of the case and the nature of evidence that the child was called to give, the child possessed sufficient competence to justify the reception of his evidence and understood the duty of speaking the truth. Furthermore, the younger the child the more care which has to be taken before admitting the evidence of the child" (Sarkar on Evidence *ibid* p. 1956). "The trial judge may resort to any examination which will tend to disclose the capacity and intelligence and in the case of an oath, his understanding of an obligation of an oath" (*Sarkar on Evidence ibid* p. 1961).

Shaun showed that he was able to understand questions put to him and give rational answers, that he was possessed of sufficient intelligence to justify the reception of his evidence, and that he was able to understand the duty of telling the truth. Shaun said that an oath meant that "he must tell the truth, and not tell lies or cheat". Shaun said that he understood each word in the oath. Nonetheless, the court was of the opinion that Shaun ought not to give his

evidence on oath, by reason of his tender age. It is not easy to put a finger on it, but the witness oath, even if it is not a religious asseveration, is still a most solemn promise with all the undertones of an appeal to a higher order as witness, to speak the truth. An oath is a grave and solemn matter. But Shaun, for all his precocity, was still raw leather. The taking of an oath by a child of nine years, who would not reasonably have had the maturity to understand the true nature of an oath, would have made a burlesque of that which is most solemn. Shaun was not admitted to give his evidence on oath.

The next ruling of the court had to do with the question of whether a *voir dire* should be ordered to determine the issue of the voluntariness of the information evidence supposedly given by OKT4. But that question has been answered by two binding authorities.

In *Md Desa bin Hashim v. PP* [1995] 4 CLJ 677, the Federal Court per Gopal Sri Ram JCA, held, at 687, " ... the principle is that ss. 25 and 26 are subject to s. 27 but all these three sections are governed by and are subject to s. 24 ... in order for a confession or other statement or information to qualify for admission under s. 27, it must have been made voluntarily. A discovery made in consequence of a confession extracted by illegitimate means in the sense described in s. 24 is inadmissible. When a challenge is taken as to the voluntariness of the information, it is imperative for a trial judge to determine that issue upon the *voir dire*.

However, that proposition that s. 27 is governed and is subject to s. 24, was rejected by the Federal Court in *Goi Ching Ang v. PP* [1999] 1 CLJ 829 at p. 847, where a panel of five judges pronounced, "it also appears that the decision in *Md Desa*, subjecting s. 27 to s. 24 cannot have application to a s. 27 statement if that statement does not amount to a confession since s. 24 relates to confessions". According to *Goi Ching Ang* (see p. 850):

> From the wordings in the two sections (ss. 24 & 27), they stand independently of each other.

But other than on that limited but important point, *Goi Ching Ang* agreed with *Md Desa*, "of the desirability as to the voluntariness of s. 27 information ". And at p. 851, on that subject of voluntariness of s. 27 information, *Goi Ching Ang* thus articulated:

> While the police ought to be given a reasonable opportunity to question suspects and accused persons, in its investigation, the accused must also be reasonably protected from the dangers of extraction of unreliable statements and of statements (even if reliable) by some improper means. Evidence obtained in an oppressive manner by force or against the wishes of an accused person

> or by trick or by conduct of which the police ought not to take advantage, would operate unfairly against the accused and should in the discretion of the court be rejected for admission. The court should ensure that the standards of propriety in obtaining s. 27 information are scrupulously followed in the police station.

Quite evidently therefore, both *Md Desa* and *Goi Ching Ang* agreed that involuntary s. 27 information is inadmissible. But only *Md Desa* mandated that whenever a challenge is taken as to the voluntariness of the information, it is imperative for a trial judge to determine that issue by a *voir dire*; *Goi Ching Ang* could have disagreed with *Md Desa*, but *Goi Ching Ang* left unsaid as to whether voluntariness should be determined by a *voir dire*. Therefore, *Md Desa* is binding authority that the voluntariness of the s. 27 information in the instant case must be determined by a *voir dire*. Accordingly, a *voir dire* was ordered to determine the issue of the voluntariness of the information evidence supposedly given by OKT4.

In that *voir dire*, OKT4 had put his case his counsel's examination of the witnesses, that he was beaten by unnamed police officers at the Muar police station. But in his testimony, OKT4 for the first time named one of the police officers who had allegedly beaten him at the Muar police station. OKT4 also for the first time alleged, that his counsel on the day he was first produced, had complained to the magistrate, that he was beaten by the police. The prosecution would not have not been taken by surprise by those sudden revelations. Nonetheless, the prosecution chose not to adduce any rebuttal evidence. Mr Harjit Singh Nijar for OKT4 submitted that an adverse inference should be drawn against the prosecution for not calling the police officer concerned to testify at the *voir dire*. The court invited the prosecution to specifically address that point. At that stage, the learned DPP applied, under s. 425 of the Criminal Procedure Code, for leave to call the officer concerned to rebut the allegation that that officer had assaulted OKT4.

Section 425 of the CPC provides that:

> Any court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

Section 425 is in 2 parts. "... the first part gives purely discretionary authority to the criminal court ... On the other hand, the second part is mandatory ..." (Hamid's *Criminal Procedure,* 2nd edn, pp. 1052-1053). "Section 425 of the Code is clearly divided into two limbs: first a discretionary provision which

provides that the court may on application, summon any person as a witness or recall and re-examine any person already examined at any stage of any inquiry, trial or other proceeding under the Code. In exercising the discretion under the first limb, the court clearly must proceed with utmost circumspection especially when there was likelihood of the fresh evidence proving to be prejudicial to the accused. Secondly, an imperative provision which requires the court to do so where the court is satisfied that the evidence to be summoned would appear to the court to be essential to a just decision of the case (*PP v. Phon Nam* [1989] 1 CLJ 7; [1989] 1 CLJ (Rep) 142 on appeal from *PP v. Phon Nam* [1987] 1 CLJ 299; [1987] CLJ (Rep) 924)" (Hamid's *Criminal Procedure ibid* 1953). That caution on utmost circumspection only concerns the first limb; "but not on the imperative provision where the court considers the fresh evidence to be essential to a just decision" (*PP v. Abdul Rahim bin Abdul Satar* [1990] 1 CLJ 840; [1990] 3 CLJ (Rep) 1 per Wan Yahaya J, as he then was). For far from being discretionary, "the power under (the 2nd limb of) s. 425 is to be exercised where the court is of the opinion that the evidence of certain witnesses is essential to a just decision of the case" (Hamid's *Criminal Procedure ibid* p. 1056). "The mandatory part of the section compels the court ... if the new evidence appears to be essential to a just decision of the case" (*Mallal's Criminal Procedure* 5th edn para 15527).

The main consideration is "the essentiality of the additional evidence for the purpose of arriving at a just decision of the case" (*Phon Nam v. PP* [1991] 2 CLJ 1467; [1991] 1 CLJ (Rep) 381 per Hashim Yeop Sani CJ).

Hashim Yeop Sani CJ went on to say:

> The real object of the exercise of discretion under s. 425 of the Code is to enable the court to arrive at a just decision so that the failure to call for the additional evidence would not result in an erroneous acquittal or in an erroneous conviction. The exercise of the discretion is not an arbitrary decision to favour the prosecution or the defence. The discretion is never intended to make 'emergency repairs' to the prosecution case as correctly stated by Mohtar Abdullah J in *PP v. Lin Lian Che*n.
>
> At the core of s. 425 is the interest of justice and the exercise must always be in the interest of justice.

In an earlier appeal, Mohd. Azmi SCJ, in *Ramli bin Kechik v. PP* [1986] 1 CLJ 309; [1986] CLJ (Rep) 243, expounded the scope of s. 425 of the Code as follows:

> the section is to enable the court to get at the truth and to come to a proper conclusion in the matter under enquiry or trial. Hence the defence as well as the prosecution may be allowed to adduce additional evidence. The object of the section is just as much the prevention of escape of a guilty person through some carelessness of the prosecution or the magistrate as the vindication of the innocence of the person wrongly accused owing to the carelessness and ignorance of one party. If there is the apprehension of justice failing by an erroneous acquittal or by an erroneous conviction the court would be justified in exercising its discretion in calling for additional evidence under this section. Where the court is of the opinion that the evidence of certain witnesses is essential to the just decision of the case, it is bound to summon them, and for this purpose the trial can be adjourned. A just decision under this section does not mean a decision in favour of the defence. This would not be an improper exercise of the power merely because the evidence taken supports the case of the prosecution and not that of the accused. In our view, by its very nature the discretion to be exercised under section 425 CPC depends on the facts of each case – the main consideration being the essentiality of the additional evidence to a just decision of the case.

Apparently, "a judge should not be completely oblivious to the surrounding events at the trial affecting his assessment of a case" (*PP v. Abdul Rahim bin Abdul Satar (supra)* at p. 190). "The role of a presiding judge is something more than merely to be an umpire or a referee in games played. So far as court proceedings are concerned, the court has got to be alert, active and positive to participate and cannot just afford to be a lone bystander on a platform watching the game declaring the points or runs: *State of Gurajat v. Butasing Indrasing* [1990] 3 Crimes 619, 624" (Hamid's *Criminal Procedure ibid* p. 1053).

However, not all authorities directly say that at any stage of any inquiry, trial or other proceeding under this Code, the court has powers to summon any person, *albeit* that s. 425 of the Code clearly provides that the court has the powers "at any stage of any inquiry, trial or other proceeding under this Code". In *Loke Poh Siang v. PP* [1957] 23 MLJ 107, it was held that the court enjoys an absolute discretion "in re-calling and calling a witness after the close of the prosecution case to rectify an omission in the prosecution case". But Ali J (as he then was), in *PP v. Boo Chew Ha* [1963] 29 MLJ 33, seem to have indicated that the powers under s. 425 ought to be exercised before the 'address' of defence counsel. In both *Ramli bin Kechik v. PP (supra)* and *PP v. Abdul Rahim bin Abdul Satar (supra)*, the power under s. 425 was exercised whilst it was still at the stage of the prosecution case, whilst in *PP v. Phon Nam* [1989] 1 CLJ 7; [1989] 1 CLJ (Rep) 142, the application for leave under s. 425 of the Code was made at the close of the prosecution case. In *Phon*

Nam v. PP [1991] 2 CLJ 1467; [1991] 1 CLJ (Rep) 381, the trial judge allowed the prosecution to recall a witness to prove some essential part of their case, after submission at the close of the prosecution case by defence counsel had revealed an inherent weakness in the prosecution case. However, on appeal, the then Supreme Court held that in order to maintain a balance between the interest of the accused and the duty of the prosecution to prove every ingredient of the offence at the close of the prosecution case, the second application by the prosecution (the 1st application was allowed in *PP v. Phon Nam* [1989] 1 CLJ 7; [1989] 1 CLJ (Rep) 142 by the then Supreme Court) for leave under 425 of the Code should not have been allowed by the trial court. Pertinently, in *Phon Nam v. PP* [1991] 2 CLJ 1467; [1991] 1 CLJ (Rep) 381, the then Supreme Court did not rule that an application for leave under s. 425 of the Code should not be allowed after submission by defence counsel has revealed an inherent weakness in the prosecution case. *Illian & Anor v. PP* [1988] 1 MLJ 421 offers no guide either.

However, in *Kee Seng Nee v. Rex* [1949] 15 MLJ 210, where the magistrate recalled certain witnesses after defence counsel had addressed the court, and it was contended by the learned DPP that this had not occasioned any miscarriage of justice, Murray-Aynsiey CJ held that the magistrate had overcome his doubts by means (recalling witnesses) which were not open to him, and ordered a re-trial; Murray-Aynsiey CJ did not impart any reasons for his decision.

But Rigby J, in *Re Adam: Hoesin bin Ghani v. PP* [1958] 24 MLJ 229, held *Kee Seng Nee v. Rex (supra)* "to be of little assistance for the purpose of resolving the principle involved" with regard to the issue before His Lordship – whether or not the magistrate is justified in the exercise of his discretion in calling a witness to prove a technical, although an obviously essential point overlooked in the presentation of the case for the prosecution. The facts *In Re Adam* were that the magistrate called a bank official as a witness, after the prosecution had closed its case and defence counsel had submitted that no case had been made out on the ground that there was no evidence that the currency notes were in fact genuine Indonesian currency and or legal currency at the time of the offence, and after the defence had elected not to make a statement and defence counsel had repeated his earlier submission. After a careful consideration of several authorities (both Malayan and English), Rlgby J held that the magistrate, in view of the mandatory provisions of the 2nd part of s. (425), was not wrong in doing so.

Rigby J accepted that a line of English authorities (*R v. Browne* 29 Cr. App. R 106; *R v. Owen* [1952] 1 All ER 1040; *R v. Sanderson* [1953] 1 All ER 485; *R v. Joseph Wilson* 41 Cr. App. R. 226) had laid down the principle that once a summing-up had been given no further evidence should be allowed. But his Lordship said that the powers conferred upon the court under s. (425) are wider than the corresponding powers in English law (see p. 238). His Lordship concluded:

> The Court is expressly vested with the statutory power at any time before judgment to call or recall a witness if his evidence appears to it essential to the just decision of the case. The sole test is whether he has properly exercised his discretion lies in the answer to those last words, namely, was such evidence essential to the just decision of the case or, put in another way, did the calling of such evidence occasion a miscarriage of justice. It seems to be that the answer to that question must logically be that every case must be considered on its own merits and in relation to its own facts. I would venture to express the opinion that it is not sufficient for the appellate Court to say that the Magistrate has wrongly exercised his discretion merely because the appellate Court itself would not similarly have exercised the same discretion in the same way.

That s. 425 gives a wide power to the court was also stated in *PP v. Samsul Kamar bin Mohd. Zain* [1988] 1 CLJ 542; [1988] 2 CLJ (Rep) 310; KC Vohrah J (as he then was) said:

> Section 425 further allows any court 'at any stage of any inquiry, trial or proceeding' under the Criminal Procedure Code, to summon and examine any person as a witness if his evidence appears to it essential to the just decision of the case. There is a power to or recall witnesses even after the close of the case for the defence but in such a case there should be hesitation to do so without strong grounds (see *R v. Bakar bin Sahat* [1951] MLJ 202).
>
> To my mind, the utmost caution and the same hesitation should apply before witnesses are recalled or called at the stage of defence proceedings bearing in mind that the pivotal principle should be that the evidence required appears to be essential to the just decision of the case. Having regard to the fact that the prosecution has been surprised by the application of the defence and that the prosecution's examination of its witnesses will be limited to that narrow issue mentioned earlier, ie, the rebuttal of facts alleged by the accused in his testimony and allegedly corroborated by a previous statement, to my mind, witnesses may be called by the prosecution after it has closed its case for the limited purpose of that narrow issue.

Syed Othman J (as he then was), in *PP v. Abdul Hamid* [1969] 1 MLJ 53, expressed similar views that s. 425 gives wide powers to the court to summon and examine any person to give evidence, and reiterated that the power must be exercised with the utmost caution and only when the evidence of that person appears to the court essential to the just decision of the case. His Lordship likewise stressed that "in a criminal trial at the close of a case of any party the court should not call any witness unless there is strong and valid reason.

The facts of *PP v. Harilal Sachi s/o Narayan* [1995] 4 CLJ 745, which bear comparison to the instant facts, were as follows. During the examination in chief of the accused before the learned magistrate, the accused stated that his evidence was the same as his statement to the police. The learned magistrate ruled that there was a difference between the testimony of the accused and certain passages in the statement of the accused to the police. Defence counsel objected to the tendering of the statement for the purposes of impeaching the credit of the accused, on the ground that it was not voluntarily made. The learned magistrate ordered a *voir dire* to decide on its admissibility. However, the only prosecution witness (TPW1) forgot entirely to identify the statement allegedly made by the accused. Learned counsel then informed the court that the defence had no witnesses and then proceeded to submit that there was no statement as TPW1 had not identified the alleged statement. The prosecuting officer then applied to recall TPW1 under s. 425 of the CPC. Defence counsel argued that it was all too late. The learned magistrate concluded that the trial within a trial had closed after the last witness was called. The application for recall was rejected and dismissed. On appeal, learned counsel posed the question whether the court can invoke s. 425 of the CPC, after both the prosecution and defence case had closed. Learned counsel cited *R v. Day* [1940] 1 All ER 402 in support of his contention that the learned magistrate was right in refusing the application of the prosecution.

Abdul Kadlr Sulalman J (as he then was) declared however that he could not agree with *R v. Day*, "because the decision in that case is not based on a similar provision as contained in our s. 425 of the CPC" (see p. 666). But his Lordship readily agreed that the 1st part of s. 425 is discretionary and that the 2nd part is mandatory if the witness' evidence appears essential to the just decision of the case. And on the question posed by learned counsel, His Lordship held that "unless and until a decision or judgment is pronounced, the trial is not closed nor completed".

Now whether *R v. Day* was or was not based on a similar provision as contained in s. 425 of the CPC, yet it remained that the present facts still came within the principle of *R v. Day*, where it was held that where any matter arises improvise which no human ingenuity can foresee there is no reason why that matter may not be answered by contrary evidence on the part of the

crown. For unlike *Ramasamy v. R* [1955] MLJ 95, the prosecution in the present case could not have foreseen, even with all human ingenuity, since OKT4 had not given any notice nor put such a case, that OKT4 would name the particular officer who had allegedly assaulted him (OKT4). As said, the prosecution would not have not been taken by surprise. It would not have been been fair, if opportunity was not given to rebut the evidence given improviso. After all, "full justice cannot be done until both parties are heard" (*Rameshwar Dayal v. State of UP* AIR [1978] SC 1558). Moreover, the rebuttal evidence was not to repair the prosecution case but for a limited purpose – to rebut the evidence given improviso. And on the crucial issue of the voluntariness of the s. 27 information, it was the opinion of the court, that the evidence of the police officer concerned was absolutely essential for the court to come to a proper conclusion, for without the evidence of the police officer concerned, there was the apprehension of justice failing by an erroneous ruling. After all, it was OKT4 who triggered the application to adduce rebuttal evidence, and OKT4 should not complain if fair opportunity is given to the prosecution to respond. Besides, the mandatory part of s. 425 compelled the court to allow the application, so as "to get at the truth". Admittedly, the prosecution was slow in applying for leave. Nevertheless, the trial within a trial was still not over, and the main consideration was still the essentiality of the additional evidence to a just decision. Leave was therefore granted to the prosecution to call the police officer concerned to testify at the *voir dire*, but only to rebut the evidence given improviso.

Six *voir dires* in all were conducted. The 1st *vire dire* was abandoned by the prosecution. The 2nd *voir dire* concerned the information evidence supposedly given by OKT4. The remaining four *voir dires* concerned four caution statements supposedly given by OKT2, OKT5, OKT7, and OKT8. With regard to the conduct of those four *vire dires*, both the prosecution and defence agreed that the prosecution shall first put forth its entire case in respect of all four caution statements, and that the four accused persons concerned shall give their evidence later. But after the prosecution had called its inquiry witnesses and closed its case in respect of all four caution statements, the defence submitted that the legal requirements of s. 16 of the Kidnapping Act 1961 had not been fulfilled and that the accused concerned need not testify at the *voir dire*. Mr Mohd. Azari bin Harun, the learned Deputy Pubic Prosecutor, submitted that there is no right to submit "no case to answer" in a *voir dire*, but added that he would nonetheless reply to the submission of the defence.

According to Augustine Paul J in *PP v. Kulaiselvan* [2001] 4 AMR 3973, the local authorities are not in agreement on the matter of the right of an accused to submit "no case to answer" in a *voir dire*. His Lordship referred specifically to *PP v. Muniandy & Ors* (Selangor Criminal Trial No. 58-10-1986,

unreported), where it was held that the submission of no case to answer, when the accused had yet not given his evidence in the *voir dire*, was premature, and, *PP v. Aidil bin Ma'rof* [1992] 2 CLJ 1239; [1992] 3 CLJ (Rep) 317 where the court allowed the defence to submit at the close of the prosecution case in the *voir dire*. After surveying the law relating to a trial within a trial, Augustine Paul J as follows:

> ... a trial within a trial cannot be equated with an ordinary criminal for all purposes from a procedural point of view. There is at least one vital difference between both the proceedings. It relates to the right of an accused to make a submission of no case at the end of the case for the prosecution. In an ordinary criminal trial the prosecution must make out a *prima facie* case at the end of its case failing which the accused is entitled to an acquittal. This gives him a right to make a submission of no case to answer. In the light of the subjective consideration underlying the test of voluntariness in a trial within a trial, the accused must discharge the evidential burden of establishing the allegations raised by him ... It is only after he has discharged his evidential burden that it becomes the function of the court to determine the issue of voluntariness. This means that the question of the prosecution making out a *prima facie* case in a trial within a trial does not arise before the accused is called to testify. This will preclude the making of a submission of no case to answer at the end of the prosecution case as in an ordinary trial.

Augustine Paul J nonetheless held that a submission of no case to answer can be made "if it is based on grounds which do not require the testimony of the accused":

> It can be made on a point of law, as for example, when the required caution has not been administered in accordance with law or when the evidence adduced is insufficient in law. Evidence would be insufficient in law when the prosecution has failed to call some material witnesses. In these instances a ruling can be made based merely on the evidence adduced by the prosecution and it would be an exercise in futility to carry on with the trial within a trial to its conclusion as the result would be the same even if the accused were to testify ... I am therefore of the view that the accused has the right to make a submission of no case to answer on points of law at the close of the case for the prosecution, and if the submission fails he has the right to give evidence and call witnesses.

In *R v. Jackson* Court of Appeal (Criminal Division 21 December 1984), it was submitted that in declining to rule on the defence submission at the end of the prosecution case that the statement was involuntary the trial court was in error. The Court of Appeal observed that "there is no authority for that proposition", and held that "the proper time for the submission is at the end of all the evidence". However, the Court of Appeal acknowledged that in a totally exceptional case, it is the duty of the judge at the close of the prosecution case in a voir dire so to rule of his own motion:

> We accept that the prosecution evidence may establish, indeed it may establish before the last prosecution witness has been called, in a totally exceptional case, that a statement has not been obtained voluntarily. If a police officer gives evidence which makes it entirely clear that a defendant has been persuaded to make an admission by threat or inducement, then we accept, and indeed we are clear, that it is the duty of the judge at that stage so to rule of his own motion. But on the other had, if the judge is in doubt or if his tentative view of this is that the statement has been obtained voluntarily, it would in our view be wrong and inappropriate for him to rule that the statement has been obtained voluntarily before he has heard the defence evidence and before he has heard whether any defence evidence is going to be called or not. It would put him in a totally embarrassing situation and indeed at a grave disadvantage if he did so rule.
>
> ...
>
> In our view, the normal course is to take this point in the absence of the jury, having forwarded the prosecuting counsel to take it on the *voir dire*, but if the normal course is not to be followed, then the second procedure outlined by Lord Bridge in *Ajodha v. The State* [1981] 2 All ER 193 envisages that ordinarily the proper place to make the submission is at the close of the evidence.

The procedure outlined by Lord Bridge in *Ajodha v. The State* [1981] 2 All ER 193 (and Lord Bridge made it absolutely clear that the procedure outlined is not an exhaustive code of procedure intended to cover every contingency but is only the appropriate procedure in a number of not uncommon situations) was the following:

> 1. In the normal situation which arises at the vast majority of trials where the admissibility of a confession statement is to be challenged, defending counsel will notify prosecuting counsel that an objection to admissibility is to be raised, prosecuting counsel will not mention the statement in his opening to the jury, and at the appropriate time the judge will conduct a trial on the *voir dire* to decide on the admissibility of the statement; this will normally be in the absence of the jury, but only at the request or with the consent of the defence: see *R v. Anderson* [1929] 21 Cr App R 178.
>
> 2. Though the case for the defence raises an issue as to the voluntariness of a statement in accordance with the principles indicated earlier in this judgment, defending counsel may for tactical reasons prefer that the evidence bearing on that issue be heard before the jury, with a single cross-examination of the witness on both sides, even though this means that the jury hear the impugned statement whether admissible or not. If the defence adopts this tactic, it will be open to defending counsel to submit at the close of the evidence that, if the judge doubts the voluntariness of the statement, he should direct the jury to disregard it, or if the statement is essential to sustain the prosecution

case, to direct an acquittal. Even in the absence of such a submission, if the judge himself forms the view that the voluntariness of the statement is in doubt, he should take the like action *proprio motu*.

3. It may sometimes happen that the accused himself will raise for the first time when giving evidence an issue as to the voluntariness of a statement already put in evidence by the prosecution. Here it will be a matter in the discretion of the trial judge whether to require the relevant prosecution witnesses to be recalled for further cross-examination. If he does so, the issue of voluntariness should be dealt with in the manner as indicated in para 2 above.

4. Particular difficulties may arise in the trial of an unrepresented defendant, when the judge must, of course, be especially vigilant to ensure a fair trial. No rules can be laid down, but it may be prudent, if the judge has any reason to suppose that the voluntary character of a statement proposed to be put in evidence by the prosecution is likely to be in issue, that he should speak to the defendant before the trial begins and explain his rights in the matter.

The House of Lords opined, in *R v. Brophy* [1982] AC 476, that an accused "can almost never make an effective challenge of its admissibility without giving evidence himself". "The failure of the defendant to give evidence may leave the trial judge with a one-sided picture of the evidence, although calling the defendant may too, have disastrous consequences for the defence submission ..." (*Archbold Criminal Pleading, Evidence and Practice* 2002 para 15-288). That may very well be so. Nonetheless, it would hardly appear to be the law that an accused has no right to make a submission of no case to answer at the end of the prosecution case on the *voir dire*. Rather, the converse appears to be the case, and in that connection, *Archbold ibid* at para. 15-288 has this to say:

Where, however, there are clear breaches of the codes of practice, the evidence of the defendant may add little weight to an attack upon the confession evidence; see, for example, *R v. Walsh*, 91 Cr App R 161, CA. For a full discussion on these points, see the reference to Keenan, ante at para 15-415, post. This approach, it is submitted, envisages that it will be more common for challenges to confession evidence to be based upon a scrutiny of the police case rather than the defence evidence. The scrutiny will be made either on the papers (the custody record and the witness statements) or from live evidence, particularly evidence which the prosecution may wish to call in order to justify what appears to be a *prima facie* breach (see *Keenan*, at pp. 64, 8).

Indeed there are ample instances of the court hearing submissions of no case to answer on the *voir dire* (*Crosdale v. The Queen* [1995] 2 All ER 500; *R v. Naylor* Court of Appeal Criminal Division 2 February 1995; *HKSAR v. Hui Chi Wai and Ors* 2001 – 3 HKC 531; R v. Tang Yuk Yan 1991 – 2 HKC

214), or of the court taking cognizance of the practice of a submission of no case to answer at the end of the leading of the prosecution's evidence (*Swaby v. The Queen* Privy Council 22 December 1997). Therefore, in the light of the authorities, it has to be, that where the challenge to the confession evidence is to be based upon a scrutiny of the prosecution case and not of the defence evidence, an accused may raise a submission of no case to answer at the close of the prosecution case on the *voir dire*.

In the present case, the challenge to the admissibility of the four caution statements was undoubtedly based upon a scrutiny of the prosecution case, for it was contended that the prosecution had not complied with the provisions of s. 16(2) of the Kidnapping Act 1961. It was conceded by the prosecution that none of the recording officers testified that they had explained to the accused that they were not bound to answer any question, or that they had read the provisions of s. 16(2) of the Kidnapping Act 1961 to the accused. But the learned DPP contended that s. 16(2) merely states the legal position, but does not impose a duty upon the recording officer to inform the accused that he is not bound to answer any question. The learned DPP further contended the caution in the Kidnapping Act is different from the caution in other Acts, that the provisions of s. 16(3) is peculiar to the Kidnapping Act, and that the provisions of section of 16(2) need only be brought to the attention of the accused if a police officer, has made up his mind to charge the person. The learned DPP added that there is no evidence that a police officer had made up his mind to charge the accused at the material time, and s. 16(2) as such has no application.

There is no explanation for it, but there is a distinct difference between the caution in the Kidnapping Act, and the caution in the Criminal Procedure Code or Dangerous Drugs Act 1952. The caution in the CPC (see s. 113(1)(a)(ii)) and the caution in the DDA (see s. 37A(1)(b)) are identical, and they read as follows:

> It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say whether in answer to a question or not, may be given in evidence.

However, the caution under s. 16(1)(b) of the Kidnapping Act 1961 reads as follows:

> Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.

The difference is obvious, and it is not just in the words. In the case of the s. 113 caution or s. 37A caution, an accused will be informed that he is "not obliged to say anything or to answer any question". However, in the case of the caution under s. 16(1)(b) of the Kidnapping Act, an accused will not be informed that he is not obliged to answer any question.

Yet, there is s. 16(2) of the Kidnapping Act, which reads as follows:

> Notwithstanding anything to the contrary contained in any written law a person accused of an offence under this Act shall not be bound to answer any questions relating to such offence after such caution as aforesaid has been administered to him.

It is appropriate to add, that both the CPC (see s. 113(2)) and the DDA (see s. 37A(2)) contain a provision in *pari materia* with s. 16(2) of the Kidnapping Act, and that "it is a canon of construction that statues that are in *pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject" (*Black's Law Dictionary,* 4th edn, p. 795).

It was submitted that s. 16(2) merely spells out the legal effect of s. 16(1)(b). But how could an accused get to know in the first place, without being informed, that he is not bound to answer any question? The s. 16(1)(b) caution does not inform an accused that he is not obliged to answer any question, and so even an unimpeachable administration of the s. 16(1)(b) caution will not inform an accused that he is not obliged to answer any question.

By contrast, both the s. 113 caution and s. 37A caution inform an accused that he is "not obliged ... to answer any question". And since both the s. 113 caution and s. 37A caution inform an accused that he is "not obliged ... to answer any question", it may well be argued that the provisions of s. 113(2) or s. 37A(2) are repetitive and therefore redundant. But the same could not be said of s. 16(2) of the Kidnapping Act, as the s. 16(1)(b) caution does not inform an accused that he is not obliged to answer any question. The legal question is voluntariness, but a failure to read the provisions of s. 16(2) will leave a doubt as to whether an accused fully understands that he is not obliged to answer any question. Therefore, under the Kidnapping Act, it is imperative to read the provisions of s. 16(2) to the accused, to remove that doubt, and to comply with the requirements of the law as well.

It was submitted that the provisions of section of 16(2) need only be brought to the attention of the accused if a police officer has made up his mind to charge the accused. The short answer is this, that pursuant to s. 16(3) a police officer may question a person whom he has not cautioned, if he has not made up his mind to charge that person. But if that person is later charged for an

offence under the Act, then he is entitled to the protection afforded by subss. (1) and (2). His statement to questions permitted under s. 16(3) could be admitted, if he had not been first cautioned in the manner prescribed in subss. (1) and (2). Otherwise, his statement made without being forewarned of the consequences could be admitted. And that could not have been the intention of the legislature.